1979

Park City Utah Corporation, A Corporation, and City Development Corporation, A Corporation v. Ensign Company, A Limited Partnership : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

PARK CITY UTAH CORPORATION, a corporation, and CITY DEVELOPMENT CORPORATION, a corporation,	)	
Plaintiffs-Respondents,	)	
vs.	)	No. 15410
ENSIGN COMPANY, a limited partnership,	)	
Defendant-Appellant.	)	

APPELLANT'S BRIEF

Appeal from the Partial Summary Judgment
of the Third District Court for Summit County
The Honorable James S. Sawaya, Judge
And the Prior Interlocutory Order of April 8,
1975 of the Fourth District Court for Summit County
The Honorable Maurice Harding, Judge

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NATURE OF CASE

This case is here on appeal from a partial summary judgment in the amount of $98,000 against the defendants, including the defendant Ensign Company.

DISPOSITION BELOW

The Third District Court, Summit County, granted plaintiffs-respondents' motion for partial summary judgment in the sum of $98,000 on September 6, 1977.

RELIEF SOUGHT ON APPEAL

Defendant-appellant, Ensign Company, seeks a reversal of the partial summary judgment entered below and a remand to the trial court for trial and resolution of disputed issues of fact.

STATEMENT OF THE FACTS

This case is yet another volume in the saga involving the Park West ski resort, with which this Court is all too familiar.* It began in a straightforward manner in early 1971 with the filing of a complaint seeking partition of real estate in the Park West resort area, and seeking only such a partition.**

Park West was conceived by Robert Major and Robert Ensign who in January 1967 entered into a contract by which they agreed to acquire land and develop and operate it as a resort, with Major to provide certain services and leaseholds and Ensign to pay for the land acquired. Major was to receive one-half of all land acquired. Subsequently, Major's interests were acquired by plaintiffs and Ensign's interests were acquired by defendants.

As of 1971 sizeable tracts of land were either being acquired or had been acquired from various parties. Much of the land was being acquired under executory real estate contracts. (See, e.g., R. 499, 508, 524-525, 530.)

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* Russell v. Park City Utah Corp., 29 Utah 2d 184, 506 P.2d 1274 (1973); Ski Park West, Inc. v. Major-Blakeney Corp., 30 Utah 2d 371, 517 P.2d 1325 (1974); Downey State Bank v. Major-Blakeney Corp., 545 P.2d 507 (Utah 1976); Russell v. Park City Utah Corp., 548 P.2d 889 (Utah 1976); Downey State Bank v. Major-Blakeney Corp., 556 P.2d 1273 (Utah 1976).

** Because of the undue size of the record, appellant furnishes herewith a separate appendix containing the material portions thereof.

However, at least one parcel, acquired from one Nielsen, was purchased by Major-Blakeney Corp.,* (see, Downey State Bank v. Major-Blakeney Corp., 545 P.2d 507, 508 (Utah 1976)) which gave back a purchase money mortgage (R. 534, App. 50A) thereafter assigned to Downey State Bank (R. 534, App. 50A). This appeal only involves the rights, if any, of the parties following the foreclosure by Downey State Bank** of the mortgage as to a portion of the land originally included within the mortgage.

The complaint, filed in February 1971, alleged the January 1967 agreement (R. 8-18, App. 6-25) between Major and Ensign which called upon Ensign to buy certain property and to allocate one-half of what was bought to Major. As alleged by the complaint, a dispute had arisen between the parties concerning this property division and the complaint prayed, and only prayed, that the property rights of the parties be determined (R. 3-7, App. 1-5, see especially R. 7, App. 5).

On May 21, 1971, the district court (Harding, J.), upon stipulation, entered an order partitioning a substantial portion of the land within the resort (R. 164-167, App. 25-28). On July 23, 1971, counsel for the parties executed

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* Major-Blakeney Corp. was, along with the named plaintiffs, a corporation controlled by Robert Major and/or Joseph Krofcheck. Its interest was assigned to plaintiffs.

** See Downey State Bank v. Major-Blakeney Corp., 545 P.2d 507 (Utah 1976).

a stipulation agreeing to a partition of the remaining land (R. 203-207, App. 29-32).

The July 23, 1971 stipulation further provided that with respect to certain parcels "being acquired" by the parties under "executory real estate contracts" and in turn "being sold to third party purchasers," that, "for the protection of the existing original sellers and third party purchasers," the defendants would "apply third party purchaser proceeds to original seller obligations" to the extent they were "not heretofore assigned."

Based upon that stipulation the district court executed, also on July 23, 1971, a "Judgment on Stipulation" (R. 208-214, App. 32-35). Both the Stipulation and the Judgment were prepared by plaintiffs' counsel (R. 749, App. 54) on plaintiffs' counsel's letterhead. The relevant portions of the Stipulation read as follows:

> 8. That the parties hereto recognize that there are presently several executory real estate contracts involved in the Park City West project wherein property is being acquired for the project from original sellers and certain properties within these original acquisitions are being sold to third party purchasers. With respect to these transactions, it is hereby agreed and stipulated as follows:
>
> A. That for the protection of the existing original sellers and third party purchasers the defendants shall without restriction or limitation, except as herein provided, apply third party purchaser proceeds to original seller obligations.
>
> B. On receipt of third party proceeds not heretofore assigned* and pending disbursements

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* Inserted by hand in the original.

thereof to original seller obligations, the defendants shall deposit said proceeds in a separate trust account the establishment, terms and conditions of withdrawal therefrom to be subject to the approval of plaintiff. It is the intent hereof that said proceeds are to be segregated from the general funds, accounts and expenditures of defendants and applied only to original seller obligations, and are to be received and held in trust by the defendants to insure performance of the obligations to original sellers.

* * *

The July 23rd Judgment reads, in relevant part:

> IT IS FURTHER ORDERED that for the protection of the existing original sellers and third party purchasers the defendants shall without restriction or limitation, except as herein provided, apply third party purchaser proceeds to original seller obligations:
>
> A. On receipt of third party proceeds not heretofore assigned* and pending disbursements thereof to original seller obligations, the defendants shall deposit said proceeds in a separate trust account the establishment, terms and conditions of withdrawal therefrom to be subject to the approval of plaintiff. It is the intent hereof that said proceeds are to be segregated from the general funds, accounts and expenditures of defendants and applied only to original seller obligations, and are to be received and held in trust by the defendants to insure performance of the obligations to original sellers.
>
> * * *

It should be noted that despite the crucial importance of the status of "executory real estate contracts" "existing original sellers," "third party purchaser proceeds" and whether they had been "heretofore assigned" neither the Stipulation nor the Judgment set forth in generality or detail what "executory real estate contracts" there were,

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* Inserted by hand in the original.

who the "existing original sellers" were, what "third party purchaser proceeds" there were and to what extent they had been "heretofore assigned."

This Stipulation and Judgment were entered on the record without the knowledge or consent of Ensign Company or Robert Ensign, the sole general partner of defendant-appellant (R. 813-815, App. 65-67). Indeed prior to the entry of the Stipulation and Judgment, Ensign Company and Ensign had assigned all of their interest to the other defendants and were no longer in management of the project (R. 814, App. 66).

In June 1974, the plaintiffs set in motion various proceedings which ultimately resulted in the judgment from which defendant now appeals. The first step was to obtain, ex parte, an order to show cause (R. 389, App. 36). Upon hearing the district judge refused to cite defendants for contempt and otherwise continued the matter without date (R. 401). The matter was heard again on October 23, 1974, and the district court (Harding, J.) held that while it appeared that obligations due to sellers of the land had not in some cases been paid, plaintiffs had failed to show that defendants had received any third party purchaser proceeds which should have been applied to such obligations, or that such proceeds had been diverted. The district court also declined to enforce the underlying January 1967 agreement because "the provisions of those documents have not been incorporated in toto in the order or judgment in this cause, and are not now

before the court for consideration." The order to show cause was dismissed (R. 404-405, App. 37-39).

The matter was heard again on February 27, 1975 o plaintiffs' motion (R. 601, App. 53) to enforce the Stipula and Judgment (in support of which plaintiffs filed a 158 page affidavit, R. 441-598). At this time Dr. Joseph Krofc claimed an interest as assignee of plaintiffs. Following this hearing the plaintiffs mysteriously obtained an "order" of April 8, 1975, without prior notice to defendants, and not received by defendants until May 16, 1975 (R. 808, App. 62). For unexplained reasons the original April 8, 1975 "order" is not in the record. Based upon that so-called "order" plaintiff obtained, also ex parte, a writ of execution against the defendants in the sum of $73,653.53 (R. 426-427). No money judgment had then been entered.

The ex parte April 8, 1975 "order," upon which plaintiffs obtained their execution, in relevant part reads:

> Plaintiffs' motion . . . having come on for hearing . . . on February 27 . . . and 28, 1975 . . . and the court . . . having determined . . . it [is] the duty of the defendants to pay and discharge the purchas money obligations on the land divided to plaintiff . . ., some of which obligations are now in default; now, therefore,
>
> IT IS HEREBY ORDERED that within 14 days from February 27, 1975 . . . the defendants shall certify in writing . . . the amounts of principal and interest . . . currently due . . . upon original purchase money obligations encompassing land divided to said plaintiff . . . sufficient to obtain releases of property to said plaintiff . . .,
>
> that plaintiffs' motion for leave to execute, be, and the same is hereby, granted as to the amounts

herein referred to sufficient to discharge outstanding purchase money obligations . . .,

that should defendants fail to so provide the said balances currently due . . . or should there be a valid, verified difference between such balances, to that extent the balances certified to by the original purchase money obligees shall be taken as the correct amounts. . . . (R. 800-801, App. 59-60)

Defendants' counsel, when they learned of the so-called April 8 "order" immediately sought to have the court vacate it and the writ of execution (R. 428-438, App. 39-47). They were unsuccessful (R. 766, App. 54-55).

The first time defendant-appellant received notice of the above-mentioned proceedings was when Robert Ensign was served in California with a notice of sister state judgment in the amount of $73,653.53 on September 28, 1976 (R. 814-815, App. 67). Not only is Ensign Co. named as a defendant in this sister state judgment but also, for the first time, is Robert Ensign himself (R. 786, App. 58). As an attachment to defendant-appellant's motion for relief, appending the California filing, the April 8, 1975 "order," as a xerox copy, first appears in the record (R. 800-801, App. 59-60).

The April 8, 1975 "order" is a curious document. It did not find that defendants were justly indebted to plaintiffs in a sum certain and it does not enter judgment for such sum. Instead, the "order" found that defendants had the obligation to discharge purchase money obligations encompassing the lands earlier divided to plaintiffs, and

gave permission to plaintiffs to execute in such amount. It is these two provisions of the "order" that colored all subsequent proceedings in the case. Each judge who dealt with the case thereafter felt bound by the terms of the "order."

This "order," prepared by plaintiffs' counsel, makes no attempt to deal with important terms of the July 23, 1971 Stipulation and Judgment such as "existing original sellers," "executory real estate contracts" or "receipt of third party proceeds not heretofore assigned."

More importantly, the transcripts of the February 27 and 28, 1975 hearings recited in the "order" provide no basis for the "order." The district court's rulings as reflected by those transcripts were that plaintiffs were free to file a motion for a dollar judgment (Tr. of 2-27-75 at 57-58), the court having earlier in the hearing refused to consider plaintiffs' affidavit because it was hearsay and incompetent (Tr. of 2-27-75 at 10, 11).

Despite the fact that the April 8 "order" was not a money judgment, and despite the failure of defendants to produce certificates of amounts due on purchase money obligations, and the absence of any certificates from original sellers as to amounts due, plaintiffs, ignoring the terms of their own ex parte "order," obtained an execution in the sum of $73,653.53 (R. 426-427).

In response to various motions of appellant attacking the April 8, 1975 "order," the district court (Leary, J.) decided on June 21, 1977 to refuse to vacate the April 8, 1975 "order," but required a hearing on notice as to the amount of any money judgment and restrained the issuance of writs of execution (R. 883-887, App. 67-72). Plaintiffs and Krofcheck thereafter filed a motion for partial summary judgment (R. 919-920, App. 73-75), which motion applied solely to the Major-Blakeney land foreclosed under the Downey State Bank mortgage, and ultimately sold at sheriff's sale.

The factual record made by plaintiffs in support of their motion was only that the land had been sold at a foreclosure sale and that it cost plaintiffs $98,000 to acquire it from the foreclosure sale purchasers (Krofcheck affidavit, R. 921-923, App. 75-77). The record is barren of any suggestion that there were any proceeds from "third party purchasers" of this land, or, if so, that they had not been "heretofore assigned," or that if received by defendants that they were misapplied. Indeed the record suggests that this land was not the subject of an executory real estate contract (R. 534, App. 50A), and was never the subject of sales to third parties by the defendants. Plaintiffs'

earlier affidavit itself, which purports to show all third party purchasers, demonstrates that none of this land was sold to "third party purchasers."* It also shows that the largest parcel included in the July 23, 1971 Stipulated Judgment, the land acquired from Taylor Lott, was sold to one Gaskin, on a real estate contract, and that the contract was assigned by the parties before the Stipulated Judgment was entered (R. 559-560, App. 51-52). This contract, by plaintiff's own showing, was 43 percent in amount of all "third party purchaser" contracts (R. 461, App. 47-48). The record further reflects that Ensign Co. and Ensign have had no dealings with this land and have collected no monies relating to it since long before the Stipulation and Judgment (R. 954-955, App. 78-79).

Nevertheless, the district court (Sawaya, J.) entered partial summary judgment for $98,000 against defendants on September 6, 1977 (R. 1016-1018, App. 79-82). It is from this judgment and the prior interlocutory order leading up to it that appellant now seeks relief.

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* Major in his affidavit identified all third party purchaser contracts (R. 448). It is apparent from those contracts that none of them involve the Major-Blakeney land (R. 570-597). Plaintiffs, of course, never attempted to show that there were third party purchasers of the Major-Blakeney land.

ARGUMENT

I. DEFENDANT IS NOT BOUND BY THE JULY 23, 1971 STIPULATION AND JUDGMENT BECAUSE DEFENDANT WAS NOT A PARTY TO AND HAD NO KNOWLEDGE OF THE STIPULATION.

The April 8, 1975 "order" and September 6, 1977 partial summary judgment from which defendant now appeal rest upon and purport to enforce the July 23, 1971 Stipulation and Judgment. Although the defendants' attorney signed the stipulation and acquiesced in the judgment, the appellant had not authorized its attorney to do so, and, indeed, had no knowledge of what was being done. The record reflects why this occurred. Robert Ensign had very early on assigned his individual interest to Ensign Company, a limited partnership. Ensign Company thereafter assigned its interest to Ski Park City West in exchange for stock in that corporation (R. 812-813, App. 64-65). By the end of June 1971, Ensign Company had exchanged its stock in Ski Park City West for stock in Life Resources, Inc., which then assumed management of the project in place of Ensign (R. 814, App. 66). Thus by July 23, 1971, Ensign Company, was to all appearances out of the litigation and the failure to keep it notified of developments becomes understandable. When defendant-appellant learned of the Stipulation and Judgment, it took immediate steps toward overturning them. Courts widely observe the

> common law rule that the attorney does not have implied authority to waive the substantative rights of the party by the compromise settlement agreement.

Grossman v. Will, 10 Wash. App. 141, 516 P.2d 1063, 1069 (1973).

In Radosevich v. Pegues, 133 Colo. 148, 292 P.2d 741 (1956), the Colorado Supreme Court applied this rule and reversed a judgment based upon a stipulation of counsel of which the client had no knowledge. The court observed that

> [t]he general rule is that an attorney may not compromise his client's case without express authority.

Id. 292 P.2d at 743. The court found the judgment entered in accordance with the unauthorized stipulation to be no barrier to reopening the case, and summarily overturned it. Accord, e.g., Bice v. Stevens, 160 Cal. App. 2d 222, 325 P.2d 244 (1958); Robinson v. Hiles, 119 Cal. App. 2d 666, 260 P.2d 194 (1953); Coon v. Ginsberg, 32 Colo. App. 206, 509 P.2d 1293 (1973); Muncey v. Children's Home Finding & Aid Soc., 84 Idaho 147, 369 P.2d 586 (1962); National Valve & Mfg. Co. v. Wright, 205 Okla. 571, 240 P.2d 766 (1951); Annot., 30 A.L.R.2d 945 (1953).

This Court has recognized that an attorney may not, without authorization, compromise his client's claims. In Rackham v. Rackham, 119 Utah 593, 230 P.2d 566 (1951), this Court said

> [we agree] that an attorney has no authority to enter into a stipulation relative to substantial rights of his client without his client's consent . . . .

Id. 230 P.2d at 570. Although this Court's statement in Rackham is dicta because in that case the client was present in court when her attorney made the stipulation and failed to object, it leaves no doubt that had the client not acquiesced in the stipulation, she would not have been bound by it. This Court has thus approved the rule that a California court has called "almost universal." Bice v. Stevens, 160 Cal. App. 2d 222, 325 P.2d 244, 250 (1958).

The Washington Court of Appeals has recently articulated the due process foundation of the rule. An attorney must have implied authority to enter into stipulations and waivers concerning procedural matters or our legal system would collapse from inefficiency. But a client has a due process right guaranteed by the United States and Utah constitutions, U. S. Const. Amend. 14, Utah Const. Art. I, § 7, to his day in court when substantial rights are at stake. An attorney "has no authority to waive any substantial rights of his client." In re Houts, 7 Wash. App. 476, 499 P.2d 1276, 1279 (1972). The rule that an unauthorized settlement entered into by an attorney will not be enforced is a corollary of the client's due process right to have substantial claims determined in court if he desires. The mere employment of an attorney will not be taken as a waiver of that right.

Because the defendant-appellant in the case before this Court had no knowledge of the unauthorized stipulation

affecting substantial rights of its entered into by its attorney, the lower court erred in issuing an order and partial summary judgment based upon the Stipulation and accompanying Judgment. This denial of defendant's-appellan due process rights alone is sufficient ground for this Cour to vacate the order and partial summary judgment below. At the very least, the question of whether the defendant-appellant authorized its attorney to execute the stipulatio is an unresolved question of fact which should have barred the entry of a partial summary judgment.

II. THE DISTRICT COURT ERRED BY ENTERING A SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS WHEN THE RECORD FAILED TO SHOW THAT PLAINTIFFS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW, AND WHERE CRUCIAL ISSUES OF FACT EXISTED.

A. This Court Has Repeatedly Stressed The Fundamental Rule That Any Material Issue of Fact Is An Absolut Bar To Summary Judgment.

The district court, in granting plaintiffs' motion for partial summary judgment, ignored the stringent standard imposed by Rule 56 of the Utah Rules of Civil Procedure and this Court's interpretation of that rule. Rule 56(c) provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. (Emphasis supplied.)

This rule, by its literal terms, places on the moving party the great burden of demonstrating the absence of any material issues of fact. Wright & Miller in their treatise neatly summarize the difficulty moving parties have in meeting this "burden of demonstrating".

> It is well-settled that the party moving for summary judgment has the burden of demonstrating that the Rule 56(c) test - "no genuine issue as to any material fact" - is satisfied and that he is entitled to judgment as a matter of law. The movant is held to a stringent standard. Before summary judgment will be granted, it must be clear what the truth is and any doubt as to the existence of a genuine issue of material fact will be resolved against the movant. The burden is on the movant, the evidence presented to the court always is construed in favor of the party opposing the motion and he is given the benefit of all favorable inferences that can be drawn from it. Finally, the facts asserted by the party opposing the motion, if supported by affidavits or other evidentiary material, are regarded to be true. (Emphasis supplied.)

10 Wright & Miller, Federal Practice & Procedure: Civil, § 2727 at 524-30 (1973) and authorities cited therein. This Court has repeatedly expressed similar, if not identical, sentiments regarding the caution with which the district courts should approach the summary judgment procedure. For example, in Reliable Furniture Co. v. Fidelity & Guaranty Ins. Underwriters, Inc., 16 Utah 2d 211, 398 P.2d 685 (1965), the Court held:

> The summary disposal of a case serves a salutary purpose in avoiding the time, trouble and expense of a trial when it is justified. But unless it is clearly so, there are other evils to be

> guarded against. A party with a legitimate cause, but who is unable to afford an appeal, may be turned away without his day in court; or when an appeal is taken, if a reversal results and a trial is ordered, the time, trouble and expense is increased rather than diminished. It is to avoid these evils and to safeguard the right of access to the courts for the enforcement of rights and the remedy of wrongs by a trial, and by a jury if desired, that it is of such importance that the court should take care to see that the party adversely affected has a fair opportunity to present his contentions against precipitate action which will deprive him of that privilege.

398 P.2d at 688. Accord, Rich v. McGovern, 551 P.2d 1266 (Utah 1976); Brandt v. Springville Banking Co., 10 Utah 2d 350, 353 P.2d 460 (1960).

Furthermore, the cases in this state are legion that echo the following statement from Bullock v. Deseret Dodge Truck Centers, Inc., 11 Utah 2d 1, 354 P.2d 559, 561 (1960):

> A summary judgment must be supported by evidence, admissions and inferences which, when viewed in the light most favorable to the loser shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor. (Emphasis supplied.)

Strand v. Mayne, 14 Utah 2d 355, 384 P.2d 396, 397 (1963) (summary judgment a "harsh remedy"; should be granted only when viewing evidence in light most favorable to non-moving party "it is evident beyond a reasonable possibility that if given a trial he could not produce evidence to sustain a

judgment more favorable to him."); Russell v. Park City Utah Corp., 29 Utah 2d 184, 506 P.2d 1274 (1973); Christensen v. Financial Service Co., 14 Utah 2d 101, 377 P.2d 1010 (1963); Frederick May & Co. v. Dunn, 13 Utah 2d 40, 368 P.2d 266 (1962); Green v. Garn, 11 Utah 2d 375, 359 P.2d 1050 (1961).

In light of these cases, it is clear that a court must be very circumspect in granting a summary judgment against a party, especially when the losing party has asserted factual matters that contravene the assertion of the other party and, if true, would alter the outcome of the case.

The record as made below not only reveals the existence of material controverted issues of fact, it also reveals that plaintiffs failed to demonstrate that they were entitled to judgment as a matter of law.

B. The Judgment Below Resulted From An Erroneous Interpretation of the Stipulation and Judgment of July 23, 1971.

In entering the partial summary judgment against appellant, the court below adopted plaintiffs' theory that the Stipulation and Judgment of July 23, 1971 imposed upon defendants the duty in all events to pay for the land divided to plaintiffs. This theory, long urged by plaintiffs, first crept into the court's rulings by way of the ex parte "order" of April 8, 1975, and thereafter became a fixture in each subsequent ruling of the district court.

Once the ex parte "order" of April 8, 1975 interpreted the July 23, 1971 Stipulation and Judgment as authorizing a judgment for money damages, each district judge felt unable to depart from that interpretation without overruling a fellow district judge. Accordingly, Judge Sawaya entered partial summary judgment against the defendants, thus permitting appellant to seek reversal of the erroneous interpretation made below.

This Court must now decide whether the district court's interpretation of the July 23, 1971 Stipulation and Judgment authorizing an award of money damages was correct or erroneous. The record compels the conclusion that the district court's interpretation was erroneous.

1. The lower court failed to observe the settled rules that a stipulated judgment should be strictly construed and that it should be construed against the party who drafted it.

The April 8, 1975 "order" and the partial summary judgment authorizing an award of money damages against the defendant-appellant rely on and purport to construe the stipulated judgment of July 23, 1971. The construction of the Stipulated Judgment as authorizing an award of money damages, however, is wholly without support from the record and violates settled rules governing the construction of stipulated judgments.

When a party stipulates to a judgment he waives his right to have his claims and defenses adjudicated,

and usually, as in the present case, agrees to a compromise. Because the Stipulated Judgment issues solely upon a stipulation and does not involve adjudication on the merits, the judgment must be strictly construed to ensure that it is not used to bind a party to more than he, by stipulation, agreed. American Radium Co. v. Hipp. Didisheim Co., 279 F. 601, 603 (S.D.N.Y. 1921), aff'd, 279 F. 1016 (2d Cir. 1922). As the Tenth Circuit has said, when a judge enters a stipulated judgment, he "merely [exercises] an administrative function in recording what [has] been agreed to between the parties." Fruehauf Trailer Co. v. Gilmore, 167 F.2d 324, 330 (10th Cir. 1948). The Oklahoma Supreme Court has stated this rule even more forcefully:

> Courts are entirely without authority to enter any judgment by agreement other than a judgment falling strictly within the stipulation of the parties.

Insurance Service Co. v. Finegan, 196 Okla. 441, 165 P.2d 620 (1946).

When the lower court construed the Stipulated Judgment to authorize an award of money damages against the defendant-appellant, it violated the rule that stipulated judgments should be narrowly construed to fall within the stipulation. Nothing in the terms of the Stipulation itself or in the record indicates that the defendant-appellant agreed to have a money judgment entered against it. Indeed, the Stipulation never mentions money damages. The lower court clearly exceeded its authority when it construed the

Stipulated Judgment broadly as authorizing an award for mon damages when the Stipulation does not even hint that the defendant-appellant agreed to a money damage judgment.

The United States Supreme Court has recently applied the rule that a consent judgment must be strictly construed. In rejecting the government's effort to impose a broad construction upon a consent decree, the court noted the rule's due process basis:

> For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

United States v. Armour & Co., 402 U.S. 673, 682 (1971). As in Armour, the appellant in the case at bar waived* its due process right to litigate the claims against it and agreed to a Judgment to terminate the proceedings. The Judgment must therefore be strictly construed -- "the conditions upon which he gave that waiver must be respected . . ." Id. The broad construction that the lower court applied violated this rule and compromised the appellant's due process rights

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* If it is bound by its attorney's conduct, see Point I, supra.

The plaintiffs' contention that the defendant-appellant stipulated to have a money judgment entered against it finds support only in the broadest, most strained construction of the Stipulation and Judgment. The lower court erred when it made such a construction.

Another rule of construction of a stipulated judgment is also widely accepted -- that it should be construed as a contract:

> It is true, as pointed out by the Court of Appeals, that a stipulated judgment is not considered to be a judicial determination; "rather it is a contract between the parties," State v. Clark, 79 N.M. 29, 439 P.2d 547, 549 (1968) . . . .

Owen v. Burn Const. Co., 90 N.M. 297, 563 P.2d 91, 93 (1977). Accord, Ex parte Ferrigno, 22 Cal. App. 2d 472, 71 P.2d 329, 330 (1937); Greeson v. Greeson, 208 Okla. 457, 257 P.2d 276, 278 (1953); Insurance Service Co. v. Finegan, 196 Okla. 441, 165 P.2d 620 (1946); Grayson v. Pure Oil Co., 189 Okla. 550, 118 P.2d 644, 648 (1941); Washington Asphalt Co. v. Harold Kaeser Co., 51 Wash. 2d 89, 316 P.2d 126, 127 (1957); 47 Am.Jur.2d, Judgments § 1082 at 140 (1969).

Like any other contract, the Stipulation and Judgment should be read to determine if their meaning can be ascertained. If the language is clear and unambiguous, the intent of the parties must be ascertained from the language and terms of the agreement. Owen v. Burn Const. Co., supra. If the language is unclear or ambiguous the

judgment may be read in light of the record if the record gives it meaning, Snow v. West, 37 Utah 528, 110 P. 52 (1910), and the familiar rule for the interpretation of contracts that they are to be construed against the drafting party should be applied. See Bryant v. Deseret News Pub. Co. 120 Utah 241, 233 P.2d 355 (1951). Nothing in the record reveals that by the language used in the Stipulated Judgment the appellant agreed to the entry of a money judgment against it. And when the language of the Stipulation and Judgment is construed against the plaintiffs-respondents, whose attorneys drafted it, the construction that the lower court adopted is obviously erroneous.

Because of these numerous errors in construing the Stipulated Judgment and the concomitant invasion of the defendant's due process rights, the lower court's April 8, 1975 "order" and the partial summary judgment following it must be reversed. Appellant in what follows will demonstrate how the court below should have construed the Judgment of July 23, 1971 in light of the principles governing the construction of such documents.

2. The Judgment of July 23, 1971 applied only to that land which was covered by executory real estate contracts, and the evidence shows that the land in question was not so covered.

This Court's duty as set forth, supra, is to interpret the July 23, 1971 Stipulated Judgment from within its four corners if possible, and if not then in light of

the record as made at the time it was entered. The Judgment standing alone is ambiguous as to what land it concerns. It reads, in relevant part, "IT IS FURTHER ORDERED, that for the protection of the existing original sellers . . . the defendants shall . . . apply third party purchaser proceeds to original seller obligations" (emphasis supplied).

The Court will note that "existing original sellers" and "original seller obligations" are indefinite. Nowhere in the Judgment are these phrases defined. Thus the four corners of the Judgment are insufficient to interpret it. The Court would be in the dark as to the intent of the parties and the district court in using these ambiguous words if it were not for the Stipulation of the same date. That Stipulation, while not a model of clarity and precision, casts revealing light.

The Stipulation, in relevant part, reads:

> That the parties hereto recognize that there are presently several executory real estate contracts . . . wherein property is being acquired for the project from original sellers and certain properties within these original acquisitions are being sold to third party purchasers. With respect to these transactions, it is hereby agreed and stipulated as follows:
>
> A. That for the protection of the existing original sellers . . . [etc., as in the Judgment].

One can easily see what happened. The prefatory language quoted above as found in the Stipulation did not get repeated in the Judgment. This language which appears in the Stipulation (prepared and executed simultaneously

with the Judgment) makes clear what the parties and the court below* intended.

It must be remembered that the parties, plaintiff and defendants, were assembling sizeable land holdings in the Park West area. Much of it they were in the process of acquiring by executory real estate contracts from the original landowners. Some had been acquired by deed. As of the time of the Stipulation and Judgment of July 23, 1971, the parties had, in turn, entered into contracts to sell some portions of all this land to others, called third party purchasers by the parties.

The obligation to collect and apply proceeds only affected those lands which the parties were in the process of buying under an executory real estate contract (and, of course, where the parties had contracted with others to sell the same land, or a portion of it, and had not assigned that contract). For example if the plaintiffs had been the "buyer" under an executory real estate contract of Blackacre from Mr. S and had in turn agreed with Mr. B, to sell Mr. B Blackacre (and had not assigned the contract with Mr. B) then, and only then, would defendants, under the Stipulation and Judgment, have the obligation to apply proceeds received from Mr. B to the contract with Mr. S.

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* There is no indication that the court below declined to enter judgment in the form presented to it by counsel. Just the opposite, as both Stipulation and Judgment were prepared by plaintiffs' counsel (and on his letterhead).

But the obligation of defendants never could arise unless indeed there had been in existence as of July 23, 1971, an executory real estate contract with respect to the Major-Blakeney land which was foreclosed by Downey State Bank. Plaintiffs' submittals fail to show any such executory real estate contract. Rather, it appears that Major-Blakeney purchased the land and executed a mortgage deed. There simply was no executory real estate contract. Thus, by the very terms of the Stipulation and Judgment no obligation was imposed on defendants to collect and apply proceeds respecting that land.

The court below failed to apply the terms of the Stipulation and Judgment of July 23, 1971 when it entered partial summary judgment against appellant. The district court fell into this error because it felt bound by the April 8, 1975 ex parte "order," which "order" applied plaintiffs' interpretation, an interpretation erroneous because it fails to take into consideration the language of the Stipulation and Judgment.

3. The Judgment of July 23, 1971 applied only to that land from which there were proceeds, and the evidence fails to show that there were any such proceeds as to the land in question.

Both plaintiffs and the court below have misread the Stipulation and Judgment in another respect. That is, they assumed that plaintiffs did not need to show the existence of proceeds from third party sales contracts for the Major-Blakeney land.

The Stipulation and Judgment both recite that the collection and application of proceeds obligation was "for the protection of the existing original sellers and third party purchasers." The only way both original seller and third party purchaser could be protected was, to elaborate on the example given above, to use the proceeds from Mr. B, who was buying Blackacre from the parties, to reduce the indebtedness to Mr. S, who was selling Blackacre to the parties. If, for instance, Mr. B's payments were used to pay Mr. X for Whiteacre, neither Mr. B nor Mr. S would be protected, but would be prejudiced instead.

It follows that if there were no third party purchasers of the Major-Blakeney land (putting aside, for argument, the distinction between a mortgage and an executory real estate contract), then defendant-appellant had no duty under the Stipulation and Judgment to apply any proceeds to the Major-Blakeney land. In this respect plaintiffs-respondents have failed to meet a major burden imposed by Rule 56(c). Plaintiffs-respondents nowhere in the record established that there were any such third party purchasers of the Major-Blakeney land. Quite the contrary. The record made by Major shows affirmatively that all of the third party purchase contracts dealt with land other than the Major-Blakeney land foreclosed by the bank (R. 448, 570-597).

Thus it was error for the district court to enter judgment against defendants for $98,000, as plaintiffs'

proof in support of this figure showed only that this was the sum plaintiffs paid to acquire that portion of the Major-Blakeney land which was foreclosed by the bank. Under plaintiffs'-respondents' own proof no duty arose as to this land as no proceeds were available to be applied upon it. For this reason alone the Court should reverse the partial summary judgment.

4. The Judgment of July 23, 1971 applied only to the extent that proceeds had not been "heretofore assigned" and there is an unresolved question of fact whether the proceeds had been "heretofore assigned."

The judgment against defendants for $98,000 was erroneously entered for yet another reason. Plaintiffs-respondents failed to adduce any evidence that defendants received any third party proceeds which had not been "heretofore assigned." All that plaintiffs'-respondents' factual submissions, including the Major affidavit, demonstrate is that there were a half dozen or so contracts outstanding to third party purchasers relating to land other than that foreclosed by the bank. These factual submissions purport to show only what was payable, not what was in fact paid by those purchasers. The duty to apply funds arises by the terms of the Stipulation and Judgment only to proceeds, that is money actually received by defendants. While it may well have been the case that there were over $660,000 in payables there is no hint in the record as to what was actually received by defendants. The Stipulation and Judgment

say defendants "shall . . . apply third party purchaser proceeds;" that "in receipt of third party proceeds . . . said proceeds are to be segregated . . . and applied only to original seller obligations." Plaintiffs'-respondents' factual submissions fail to show what was received by defendant-appellant. Defendant-appellant's affidavit shows that it never received any such proceeds (R. 954-955, App. 1 Thus, at the very least there must be a trial of this disputed issue of fact -- were any proceeds received.

Furthermore if the proceeds had been "heretofore assigned" then by the express terms of the Stipulation and Judgment no duty arose. Plaintiffs'-respondents' own affidavit shows affirmatively that the land being acquired from a Taylor Lott by executory real estate contract was in large part being resold by the parties to one Reed Gaskin for $288,000, or 43% of all the third party purchaser payables. Major's affidavit also shows that the Gaskin contract was "heretofore assigned" (R. 559-560, App. 51-52). Thus there was never available to the defendant-appellant a major portion of the receivables.

In effect, plaintiffs' argument below was, and must be now, that unavailability of proceeds is no excuse. To reach this result plaintiffs-respondents not only ignore the plain language of the Stipulation and Judgment, which impose a duty only with respect to proceeds -- not accounts

receivable -- but they strain entirely out of shape other portions of the Stipulation and Judgment.

For instance plaintiffs-respondents have consistently asserted below that paragraph B of the Judgment imposes a duty to pay off all encumbrances in all events. It clearly does not. It only provides, "In the event of default by a third party purchaser, the property shall be resold and the proceeds thereof applied to any outstanding original seller obligation . . . ." If upon default and resale there is a deficiency, then and only then shall the deficiency be the obligation of defendant-appellant. Plaintiffs-respondents have utterly failed to show any default of either a contract respecting the Major-Blakeney land, or of a contract "not heretofore assigned." Not only is no default shown, but neither is any resale or any deficiency upon such resale. Thus paragraph B cannot support the summary judgment because of plaintiffs'-respondents' failure to prove any of the elements necessary to be proved under its language.

III. THE APRIL 8, 1975 "ORDER" WAS BOTH WITHOUT WARRANT FROM THE RECORD AND A VIOLATION OF DUE PROCESS.

The April 8, 1975 "order," was obtained by plaintiffs-respondents, ex parte, following hearings on February 27 and 28, 1975. This so-called "order" tainted all subsequent proceedings in one very important respect. The "order" in effect substituted plaintiffs'-respondents'

erroneous theory (that all they need show was that amounts were due on purchase money obligations to the original sellers to the parties) in place of the terms of the Stipulation and Judgment. The "order" thus precluded all district judges who later heard this matter from examining the underlying issues of what lands were covered by executory real estate contracts, what third party purchase proceeds were received by defendant-appellant, which of those proceeds had theretofore been assigned, and the manner in which the proceeds, if any, were applied.*

A. The April 8, 1975 "Order" Is Not Supported By The Record And Was Therefore Erroneous.

The April 8, 1975 "order" came into being because plaintiffs'-respondents' first attempt to raise the issue of defendants' purported failure to obey the Stipulation and Judgment, by way of an order to show cause, was resoundingly rebuffed by the district court (R. 404-405, App. 37-39). Plaintiffs-respondents then filed a motion to enforce the Judgment of July 23, 1971 (R. 601, App. 53) supported by the massive Major affidavit (R. 441-598). The matter then came on for hearing on February 27, 1975, a transcript of which has been included in the record on appeal.

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* It is interesting to note that if the April 8 "order" measure of damages was followed, plaintiffs' damages should have been the amount, at most, of Downey State Bank's foreclosure judgment, $37,744.22 (R. 433-434). If the April 8 "order" is valid and binding, then the partial summary judgment for $98,000 is clearly erroneous as it is based upon the amount Krofcheck paid to acquire the land following the sheriff's sale.

At that hearing plaintiffs-respondents proposed to show the dollar amounts required to have five parcels released to them free and clear, relying upon various documents attached to Major's affidavit (Tr. 4). Defendants' counsel correctly objected to their hearsay character and irrelevance (Tr. 4-5). Robert Major was called as a witness, but his attempt to repeat on the witness stand the substance of his affidavit was prevented by timely objection. The court correctly ruled that Major only had hearsay to offer (Tr. 10). Defendants at this time also raised the issue of what payments had actually been made on third party purchaser contracts and received by defendants (Tr. 11). The district judge repeatedly ruled that he had only hearsay and incompetent matter before him and that it would be error to rely upon it (Tr. 10, 11). The district judge then ruled that

> what we will need to do, is to have the records of those who are supposed to receive the monies on these third party purchase contracts, the records on them, and see what monies have been received. And if they haven't been collected why they haven't been collected. And then whatever has been collected, see how it has been applied. (Tr. 13.)

The court at this stage understood, as can be seen, the legal significance of the receipt of third party purchase obligations, and further suggested to plaintiffs-respondents' counsel that he use the discovery process to learn the extent of those receipts (Tr. 14) and agreed that plaintiffs-respondents were also entitled to discover what defendants' records showed as remaining unpaid on purchase

money obligations (Tr. 16). The district judge then asked how long it would take defendants' counsel to gather the two classes of information.

> The Court: Consult with your clients and tell me how much time you need.
>
> Mr. Cook [defendants' counsel]: May we have two weeks, your Honor?
>
> The Court: Yes, you may.
>
> . . . .
>
> The Court: And you have given them your figures that you claim are owing on them?
>
> Mr. Strong: Yes.
>
> The Court: They are going to check and see whether or not they can admit those figures. And if they deny them, then they will give us the figures they claim are the ones, if any, or whether they have been paid (Tr. 17-18).

(It should be noted that earlier in this hearing plaintiffs-respondents had set out the amounts they claimed to be due on five parcels of real estate. Among them was an asserted payable to Downey State Bank of $28,600. Tr. 14.)

The most that can be asserted from this record is that the district court entered a discovery order, that defendants were (a) to furnish the receipts records for the third party purchaser contracts and (b) to admit or deny plaintiffs'-respondents' figures for amounts due from the parties on purchase money obligations. No sanctions were incorporated into this order.

Much later on in the hearing, after having discussed other unrelated matters and other lawsuits involving

the same parties, the court turned again to this case, commenting:

> You entered into a stipulated judgment on that matter, and that judgment should stand. Now, they're [plaintiffs] going to come in with a motion for a dollar judgment with respect to your failure to perform under that judgment?
>
> Mr. Strong: Yes (Tr. 57).

Thus the matter rested at the conclusion of the hearing. Plaintiffs-respondents were to obtain discovery and were free to move for a dollar judgment again.

The attorneys and the court met again on February 28, 1975, and a transcript of that hearing is also part of the record on appeal, even though it is captioned for another civil action. That hearing did not concern this case in any fashion.

What warrant in this record was there for the ex parte April 8, 1975 "order"? What justification for imposing upon defendants "the duty . . . to pay and discharge the purchase money obligations on the land divided to plaintiff. . ."? What justification for the order that "within 14 days from" February 27, 1975,* "defendants shall certify in writing . . . the amounts of principal and interest . . . currently due and owing upon original purchase money obligations . . . [of] . . . land divided to said plaintiff . . . .?" Where in the record of proceedings prior to the

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* Remember, that date of this "order" was April 8, 1975, nearly 40 days from February 27.

"order" was plaintiff given "leave to execute . . . as to the amounts herein referred to sufficient to discharge outstanding purchase money obligations. . ."?

To ask these questions is to answer them. The record furnishes no justification, no warrant, for the ex parte "order" of April 8, 1975.

B. The "Order" of April 8, 1975 Deprived Appellant of Property Without Due Process.

The April 8, 1975 "order" obtained ex parte by plaintiffs was first brought to defendant's counsel's attention on May 16, 1975 (R. 808, App. 62). Despite various mot seeking to vacate the "order," the April 8, 1975 "order" was stubbornly clung to by every judge who thereafter heard the matter, resulting in a uniform refusal to look behind the "order" to the terms of the Stipulation and Judgment. The April 8, 1975 "order" thus became the "law of the case" and the ultimate justification for the entry of the partial summary judgment against appellant.

Utah Rules of Civil Procedure, Rules 5(a) and 77(d) incorporate the fundamental notion of due process -- notice and hearing. Thus Rule 5(a) provides, "Except as otherwise provided in these rules, every order required by its terms to be served . . . shall be served upon each of the parties . . . ." Rule 77(d) in turn provides:

> At the time of presenting any written order . . . to the court for signing, the party seeking such order . . . shall deposit with the clerk sufficient copies thereof for mailing as here-

> inafter required. Immediately upon the entry of an order . . . the clerk shall serve a notice of entry by mail in the manner provided for in Rule 5 upon each party . . . .

These explicit provisions were ignored to defendants'-appellant's detriment in this case. Not only the Rules but the Utah Constitution were ignored. Utah Constitution, Article I, § 7, reads, "No person shall be deprived of . . . property, without due process of law."

This fundamental constitutional right has long been held to require notice and hearing and an order or judgment which is rendered upon the record thus made.

> Many attempts have been made to further define "due process" but they all resolve into the thought that a party shall have his day in court -- that is each party shall have a right to a hearing before a competent court, with the privilege of being heard and introducing evidence to establish his cause or his defense, after which comes judgment upon the record thus made.

Christiansen v. Harris, 109 Utah 1, 163 P.2d 314, 316 (1945).

The Court has long held that ex parte orders depriving a party of substantial rights are violative of the due process clause.

> Where a court has jurisdiction of a cause and of the parties, there are undoubtedly various orders which the court in the progress of the cause may make without notice to the adverse party and be of binding effect, in the absence of a motion or notice to vacate or modify the order. But such doctrine applies only to such orders as the court has power to make without notice. It does not apply to a purported ex parte order whose effect is to deprive a party of property without due process of law . . . .

Cox v. Dixie Power Co., 81 Utah 94, 16 P.2d 916, 920-921

(1932). See also, Hilton Bros. Motor Co. v. District Court, 82 Utah 372, 25 P.2d 595 (1933); Morris v. Public Service Com'n, 7 Utah 2d 167, 321 P.2d 644, 646 (1958).

Because the ex parte "order" of April 8, 1975 was obtained in flagrant disregard of appellant's due process rights, and because it is so utterly lacking in support from the record, this Court should reverse that "order." Reversal of that "order" also requires reversal of the partial summary judgment because that partial summary judgment was predicated upon that "order."

CONCLUSION

As shown above, reversal of the partial summary judgment is required for three basic reasons. First, appellant is not bound by the Stipulation and Judgment of July 23, 1971, that the partial summary judgment purports to enforce. Secondly, and entirely independently of the first ground, the district court so misconstrued the Stipulation and Judgment of July 23, 1971 that it ignored respondents' failure to meet its burdens imposed by Rule 56 of demonstrating a right to judgment upon uncontested facts. Thirdly, and again entirely independently of any other ground, the partial summary judgment was predicated upon an "order" so erroneous and such an egregious affront to appellant's due process rights that it should be reversed.

The Court should reverse the partial summary judgment and the "order" of April 8, 1975 and remand the matter to the district court for trial upon the factual issues presented by appellant's lack of consent to the Stipulation and Judgment of July 23, 1971, and upon the factual issues posed by the terms of that Stipulation and Judgment.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, Nanci Shino, hereby certify that on the 12th day of January, 1978, I mailed a true and correct copy of the foregoing Appellant's Brief, first-class, postage prepaid, to Don R. Strong, P. O. Box 124, Springville, Utah 84663.